Supreme Court, U.S.
FILED
00 101 JUL 17 2000
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States
October Term, 2000

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission,

Petitioners,

v.

GTE NORTH INCORPORATED, UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal Telecommunications Act of 1996 (FTA) provides for federal district court jurisdiction to determine whether the final approval or rejection of an interconnection agreement by a state commission complies with the FTA. The Michigan Public Service Commission, based on state law, set intrastate rates that GTE North Inc., a local exchange carrier, challenged in federal district court by suing the individual state commissioners.

- May *Ex parte Young* be used to circumvent the Michigan Commissioners' sovereign immunity from private suit in federal court guaranteed by U.S. Const. art. III, § 2 and the Eleventh Amendment for alleged violations of the FTA when that Act's remedial scheme provides for only limited federal court review?

- Does a federal district court have general federal question jurisdiction under 28 U.S.C. § 1331 to review intrastate rates set by a state commission?

- Does the Johnson Act, 28 U.S.C. § 1342 divest a federal district court of jurisdiction to hear a complaint that seeks review of a state commission order that sets intrastate rates?

PARTIES TO THE PROCEEDING

Petitioners are John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission.

Respondents are GTE North Incorporated, United States of America, and Federal Communications Commission.

Amicus curiae before the United States Court of Appeals for the Sixth Circuit were AT&T Communications of Michigan, Inc. and MCI Telecommunications Corporation.

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The published April 20, 2000 opinion of the Court of Appeals for the Sixth Circuit is reported at 209 F.3d 909 (6th Cir., 2000) and is reprinted in the Appendix. App. to Pet. 1a-23a. The unpublished July 15, 1998 opinion of the United States District Court for the Western District of Michigan is reprinted in the Appendix. App. to Pet. 24a-31a.

JURISDICTION

The opinion of the Court of Appeals was entered on April 20, 2000. This Petition for Certiorari is being filed within 90 days of the April 20, 2000 opinion. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Since the Federal Communications Commission was a party below, Seth P. Waxman, Solicitor General, and Christopher J. Wright, General Counsel, Federal Communications Commission, are among the parties served, in accordance with Supreme Court Rule 29.4.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the following constitutional and statutory provisions, all of which are reproduced in the Appendix.

1. U.S. Const. art. III, § 2. App. to Pet. 33a.
2. U.S. Const. amend. XI. App. to Pet. 34a.
3. Telecommunications Act of 1996, as enacted, §§ 251, 252, 47 U.S.C. §§ 251, 252. App. to Pet. 38a-57a.
4. Johnson Act, 28 U.S.C. § 1342. App. to Pet. 36a.

5. 28 U.S.C. § 1331. App. to Pet. 35a.
6. 42 U.S.C. § 1983. App. to Pet. 37a.

STATEMENT OF THE CASE

This case involves GTE North Incorporated's (GTE) federal district court action against the individual Commissioners of the Michigan Public Service Commission (Michigan Commissioners). GTE claimed that a February 25, 1998 Michigan Public Service Commission (MPSC) order setting intrastate rates violated the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (FTA), (codified in scattered sections of Title 47 of the United States Code). The District Court for the Western District of Michigan dismissed GTE's action, finding that it lacked jurisdiction to hear the case. The U.S. Court of Appeals for the Sixth Circuit reversed. Neither court addressed the merits of GTE's claim and instead limited their review to the issue of federal district court jurisdiction.

In 1996, GTE commenced negotiations with AT&T Communications of Michigan, Inc. (AT&T) and Sprint relative to an interconnection agreement pursuant to the negotiation and arbitration procedures set forth in the FTA. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), this Court described the FTA and its negotiation and arbitration process as follows:

> The [FTA] fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs [local exchange carriers] are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation under 47 USC § 251(c) (1994 ed., Supp II) [47 USCS § 251(c)] to share its network with competitors. Under this

> provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect its own facilities with the incumbent's network. When an entrant seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c). See § 252(a)(1). But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder. (Footnotes omitted.)

525 U.S. at 371-373.

Failing to reach an agreement, AT&T and Sprint then petitioned the MPSC for compulsory arbitration under Section 252 of the FTA. 47 U.S.C. § 252. Before the final agreement was reached, however, GTE brought suit against the Michigan Commissioners in federal district court alleging that a January 15, 1997 MPSC interlocutory order regarding the interconnection agreement violated the FTA. The District Court dismissed GTE's complaint because the MPSC's order was not a final order approving or rejecting a final interconnection agreement. *See, GTE North v. Strand,* No. 5:97-CV-20 (W.D. Mich., June 2, 1997).

While arbitration proceedings between GTE, Sprint, and AT&T were pending, the MPSC initiated proceedings in Case No. U-11281 that undertook a comprehensive review of "Total Service Long Run Incremental Cost" (TSLRIC) studies for both GTE's regulated and unregulated services. Based on

those cost studies, the MPSC set rates and prices for GTE's unbundled network elements, resale services, and basic local exchange services, as required by the Michigan Telecommunications Act (MTA), 1991 P.A. 179, as amended by 1995 P.A. 216, Mich. Comp. Laws § 484.2101 *et seq*. The goal of the MTA, like the FTA, is to increase competition and encourage the introduction of new services and technologies in the provision of intrastate telecommunications services. *See,* Mich. Comp. Laws § 484.2101. Additionally, the MPSC's order provided that purchasers of GTE's services could request that they be sold pre-assembled, fully-operational local service platforms.

GTE filed a petition for rehearing in Case No. U-11281 that the MPSC denied in an Order dated May 11, 1998. GTE then appealed both the February 25, 1998 order and the May 11, 1998 order denying rehearing to the Michigan Court of Appeals. *GTE North, Inc. v. MPSC,* Michigan Court of Appeals No. 212284. In that appeal, GTE claims it is seeking review of "state law" issues only. The Michigan Court of Appeals has stayed that appeal pending resolution of this case.

Additionally, GTE sought review of the MPSC's February 25, 1998 Order in the U.S. District Court for the Western District of Michigan by filing a four count complaint against the Michigan Commissioners, seeking review of "federal issues." Basically, GTE alleged that the February 25, 1998 order in U-11281 violated the FTA because it (1) required GTE to file tariffs offering to sell unbundled network elements at rates set by the MPSC, and (2) required GTE to sell pre-assembled platforms. The Complaint also sought attorneys fees pursuant to 42 U.S.C. § 1988(b).

The Michigan Commissioners moved to dismiss GTE's complaint arguing, *inter alia,* that its February 25, 1998 Opinion and Order neither violated the FTA nor was preempted by federal law. Additional briefing was submitted

that specifically addressed the issue of whether the Court had subject matter jurisdiction under Section 252(e)(6) of the FTA. 47 U.S.C. § 252(e)(6).

On July 15, 1998, the District Court issued its Opinion and Order holding that it presently lacked subject matter jurisdiction to hear GTE's complaint. App. to Pet. 24a-32a. The District Court noted that in the case of *GTE North v. Strand and AT&T,* Case No. 5:97-CV-20 (W.D. Mich. June 2, 1997), it had previously addressed the issue of the extent of its jurisdiction to review a MPSC order. App. to Pet. 29a. In that prior case, the District Court found that it lacked subject matter jurisdiction to review the MPSC's order because it was not a final order approving or rejecting an interconnection agreement submitted by the parties.

Relying on its earlier decision, the District Court concluded that it did not currently have subject matter jurisdiction to review GTE's claims, stating:

> . . . GTE claims that the MPSC order violates section 251(c)(3) of the FTA and the procedures set out in section 252 of the FTA. **GTE also claims that the determinations in question will be used in finalizing pending arbitration agreements.**
>
> Pursuant to section 252(e)(6) of the FTA, when this Court reviews a final agreement, it will have authority to determine whether the agreement in question complies with sections 251 and 252 of the FTA. However, if this Court were to review the February 25 order prior to the submission of a final agreement, it "would only delay and complicate the tightly regulated process established in the Act." *Id.* at p. 7 (quoting *GTE*

> *Northwest Inc. v. Nelson,* No. C96-1991WD (W.D. Wash. March 31, 1997).) Also, if this Court were to review every MPSC decision, the MPSC would not have the opportunity during the arbitration process to correct any errors it may have committed. This Court notes that its finding that it lacks subject matter jurisdiction to decide GTE's challenges at this time should not be construed as an approval of the MPSC's decision on the issue of rebundling of elements or on the procedures used by the MPSC during the arbitration process. A determination on those issues will be made if they are incorporated into or give rise to a final agreement and are submitted to this Court pursuant to section 252(e)(6).

App. to Pet. 30a (emphasis added.)

As to GTE's contention that its claims were not based on Section 252(e)(6), 47 U.S.C. § 252(e)(6), but rather are based on a Section 1983, 42 U.S.C. § 1983, claim and a claim of preemption, the District Court regarded such a contention as merely an attempt by GTE to obtain review of an MPSC opinion prior to the time prescribed by Congress, i.e., after the formation of a final interconnection agreement. App. to Pet. 30a. Citing this Court's decision in *Califano v. Sanders,* 430 U.S. 99, 108 (1977), and *Louisville and Nashville Railroad Co. v. Donovan,* 713 F.2d 1243, 1245 (6th Cir., 1983), the District Court held that since Congress has provided an adequate procedure for review of an agency determination, the alternative bases for District Court jurisdiction claimed by GTE were inapplicable. App to Pet. 30a-31a.

GTE appealed the District Court's decision to the U.S. Court of Appeals for the Sixth Circuit. AT&T and MCI Telecommunications Corporation (MCI) moved to file an

amicus brief, contesting the substantive claims advanced by GTE. AT&T and MCI, however, did not take any position with respect to the jurisdiction of the District Court. The United States of America, on behalf of the Federal Communications Commission, intervened, urging reversal of the District Court.

On April 20, 2000, the Court of Appeals issued its opinion reversing the District Court. *GTE North, Inc. v. Strand,* 209 F.3d 909 (6th Cir., 2000). App. to Pet. 1a-23a. In doing so, however, the Court of Appeals expressed no opinion on the merits of GTE's claims. Instead, it limited its review to whether the District Court had jurisdiction to review GTE's challenge to the MPSC's February 25, 1998 Opinion and Order setting intrastate rates.

For purposes of this petition, the Court of Appeals made three critical findings. First, it found that the District Court had general federal question jurisdiction under 28 U.S.C. § 1331 to hear GTE's complaint. 209 F.3d at 915-917. App. to Pet. 9a-11a. The Court of Appeals stated that this finding was based on the language and legislative history of Section 252(e)(6) of the FTA, 47 U.S.C. § 252(e)(6), and concluded that the limitations set forth therein did not apply to this case. 209 F.3d at 918-920. App. to Pet. 14a-17a.

Second, the Court of Appeals found that the MPSC's intrastate ratemaking order deprived GTE of its rights under the FTA, thereby creating a cause of action for prospective injunctive relief under 42 U.S.C. § 1983 and *Ex parte Young,* 209 U.S. 123 (1908). 209 F.3d at 972. App. to Pet. 21a. In its opinion, the Court of Appeals noted that its earlier decision in *Michigan Bell Telephone Co. v. Climax Telephone Co.,* 202 F.3d 862 (6th Cir., 2000), similarly found that the telecommunication carrier plaintiff could sue the Michigan Commissioners under *Ex parte Young, supra.* 209 F.3d at 922, fn. 6. App. to Pet. 21a. The Michigan Commissioners have

since petitioned this Court for a writ of certiorari to review the Sixth Circuit's decision in *Climax*. That petition was docketed as No. 99-1878 and is currently pending before the Court.

Finally, the Court of Appeals held that the Johnson Act, 28 U.S.C. § 1342, did not apply in this case because federal court jurisdiction was based on alleged statutory violations of GTE's rights under the FTA which is not prohibited by the Johnson Act. 209 F.3d at 921-922. App. to Pet. 20a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals decision effectively transforms the federal district court into the primary appellate court to review virtually all intrastate telecommunications ratemaking orders of a state commission.

The fundamental question presented in this petition is whether Congress intended that a state's ratemaking process for intrastate telecommunications services be subject to federal district court jurisdiction and review, whenever it is alleged that the FTA has been violated.

The Michigan Commissioners in this case are immune from suit in federal court pursuant to U.S. Const. art. III, § 2 and the Eleventh Amendment to the U.S. Constitution. Moreover, state officers are not subject to federal district court jurisdiction under *Ex parte Young, supra,* for alleged violations under the FTA. This is because the FTA specifically provides for a detailed remedial scheme only for review of certain, specified state commission decisions.

The finding by the Court of Appeals that a federal district court has federal question jurisdiction under 28 U.S.C. § 1331 is not only contradicted by the scope and language of the FTA, but also violates the Johnson Act, 28 U.S.C. § 1342, in which

Congress expressly mandated that a federal district court is without jurisdiction to review state commission rate orders, except in certain specified instances.

The FTA and the Johnson Act, when read *in pari materia,* establish that federal district court jurisdiction to review intrastate ratemaking for telecommunications services is limited to specific circumstances, none of which are present here. The effect of the Court of Appeals' decision, therefore, is to significantly expand federal district court jurisdiction far beyond what Congress intended. Indeed, the prospect of recovering attorney fees under 42 U.S.C. § 1988, when coupled with the extended delay attendant of the bifurcated review procedure of filing for review of "federal issues" in federal district court and review of "state issues" in a state court, should prove almost irresistible to any incumbent local exchange carrier challenging an intrastate rate order of a state commission. As a result, the likelihood of the federal district court becoming the *de facto* appellate court of review of virtually all state commission intrastate telecommunications ratemaking orders would seem assured.

II. Under U.S. Const. art. III, § 2 and the Eleventh Amendment, the individual Michigan Public Service Commissioners are immune from suit in federal court and *Ex parte Young* cannot be used to circumvent that immunity for alleged violations of the federal Telecommunications Act since that Act's remedial scheme provides for only limited federal court review.

The Eleventh Amendment to the U. S. Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

> the United States by citizens of another state, or by the citizens or subjects of any foreign state.

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court explained that under the Eleventh Amendment "each State is a sovereign entity in our federal system" and that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" 517 U.S. at 54.

In *Alden v. Maine*, 527 U.S. 706; 119 S. Ct. 2240 (1999), the Court described the state's sovereign immunity, as follows:

> The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the

> Convention or certain constitutional Amendments.
>
> * * *
>
> The States thus retain "a residuary and inviolable sovereignty." The Federalist No. 39, at 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority of sovereignty.

119 S. Ct. at 2246 – 2247.

Three recognized exceptions to this constitutional limitation on federal jurisdiction over a sovereign state are: (1) Congress may abrogate the states' Eleventh Amendment immunity; (2) a State may waive its Eleventh Amendment immunity and consent to be sued in federal court; and (3) under the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), individual state officers may be sued to enjoin ongoing violations of federal law. The Court of Appeals held that the federal district court had jurisdiction to hear GTE's complaint against the individual Michigan Commissioners pursuant to *Ex parte Young*.

In *Seminole Tribe*, *supra*, this Court held that an action against State of Florida officials under *Ex parte Young* was not available because the Indian Gaming Regulatory Act (IGRA) established a remedial scheme that was significantly narrower than what would be available in suits utilizing the *Ex parte Young* doctrine. 517 U.S. at 75-76. While Congress could authorize an *Ex parte Young* action in the context of a limited remedial scheme, this Court found that Congress did not intend that result when it enacted the IGRA. *See*, 517 U.S. at 75, n. 17.

The implications of *Seminole Tribe* may be viewed as being two-fold. First, Congress is capable of fashioning remedies for violations of the statutory rights it creates. Second, Congress is a superior legislator to the courts and its choice of remedy must be respected. *Wisconsin Bell v. Public Service Comm'n of Wisconsin,* 27 F. Supp. 2d 1149, 1159-1160 (W.D. Wisc., 1998).

Given the holding in *Seminole Tribe*, the question presented is whether Congress intended to authorize the more expansive *Ex parte Young*-type actions against individual state commissioners under the FTA. A review of the FTA establishes that Congress did not intend to subject individual state commissioners to *Ex parte Young* actions for alleged violations of the FTA.

In the FTA, Congress detailed the process to be used in the negotiation and arbitration of interconnection agreements. Specifically, Section 252 of the FTA establishes the procedure under which a requesting telecommunications carrier may negotiate interconnection agreements with the incumbent telecommunications carrier. If negotiations are unsuccessful, either party may file a petition for arbitration with the state commission to arbitrate any unresolved issues.

At the conclusion of the arbitration process, the state commission must approve or reject the interconnection agreement. Either party may then file for district court review to determine if the interconnection agreement meets the requirements of §§ 251 and 252 of the FTA. 47 U.S.C. § 252(e)(6)(1). Section 252(e)(6)(2) provides for federal district court review only where a state commission makes a determination under this section. That is, only when a party aggrieved by the state's commission's determination may a party bring an action in district court to have it determined whether the interconnection agreement complies with the FTA.

The language of the FTA indicates that Congress did not intend the federal court to provide *Ex parte Young* injunctive relief. The primary reason for this is the FTA's language itself. For example, the FTA's scope of review[1] is in marked contrast to the scope of review available under *Ex parte Young*. In an *Ex parte Young* action, the Michigan Commissioners would be exposed "to the full remedial powers of a federal court, including, presumably, contempt sanctions" *See*, *Seminole Tribe*, 517 U.S. at 75. In *Seminole Tribe*, this Court noted Congress' exclusive reference to "the state" in the IGRA and contrasted it to other statutes where Congress referred to individual state officers. 517 U.S. at 75, n.17. In the FTA, Congress likewise chose the words "state commission" in the judicial review provision. In fact, the words "state commission" appears no less than 46 times in Sections 251 and 252. Nowhere in Section 251 or 252 did Congress refer to individual state commissioners. Thus, the plain language of the FTA counsels against finding that an action pursuant to *Ex parte Young* can be brought against the individual MPSC commissioners.

In vesting State commissions with such authority, Congress has embarked upon a statutory scheme that is considerably different than what has generally existed. This was noted by this Court the first time it encountered the FTA in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), when it observed:

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[1] The FTA provides different types of court review depending on the agency approving or rejecting the interconnection agreement. The first sentence of § 252(e)(6) provides for federal court review of FCC actions while the next sentence, applicable when a State commission approves or rejects an interconnection agreement, limits federal court review to a determination of whether the interconnection agreement meets the requirements of §§ 251 and 252. Section 252(e)(6) does not provide for review of State commission "actions."

> . . . Congress has broadly extended its law into the field of intrastate telecommunications, **but in a few specified areas (ratemaking, interconnection agreements, etc) has left the policy implications to that extension to be determined by state commissions, which – within the broad range of lawful policymaking left open to administrative agencies – are beyond federal control.** Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

525 U.S. at 385, fn. 10. (Emphasis added.) The fact that state commission action is authorized pursuant to a federal grant of authority to state commissions in § 252 and the fact that grant of authority is part of a "decidedly novel" statutory scheme enacted by Congress provides further justification that the FTA's limited remedial scheme that Congress devised in the FTA should be honored.

In all likelihood, when Congress enacted the FTA it intended to abrogate the states' Eleventh Amendment immunity or extract constructive waivers from the states.[2] It is now clear, however, that the Congress has no such power.[3] But

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[2] On February 8, 1996, when the FTA was signed into law, Congress was under the impression that the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, could be used to abrogate the states' Eleventh Amendment, U.S. Const., Am XI, immunity. See, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

[3] This Court overruled *Union Gas* on March 27, 1996 in *Seminole Tribe*. As a result, the Commerce Clause no longer provides Congress with the authority to abrogate the states' immunity. Additionally, on the last day of its 1998-1999 term, this Court decided *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666; 119 S. Ct. 2219 (1999), rejecting the constructive waiver doctrine. In doing so, this Court

the fact that Congress has chosen an unconstitutional remedy in the FTA does not permit a federal court to redraft the statute to allow for an *Ex parte Young* remedy. As this Court noted in *Seminole Tribe*, the courts are not free "to rewrite the statutory scheme to approximate what we think Congress might have wanted had it known that [making the state suable in federal court] was beyond its authority." 517 U.S. at 76.

If parties may now sue individual state commissioners through the *Ex parte Young* doctrine virtually the entire ratemaking process for intrastate telecommunications rates is now subject to federal district court review. All that is needed is the mere allegation that an intrastate rate, either directly or indirectly, conflicts with the FTA or a regulation promulgated thereunder. There can be no doubt that this Court-created range of remedies under *Ex parte Young* far exceeds anything contemplated by Congress. Rather than fencing off intrastate ratemaking policies and putting them beyond federal control (*see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 385, fn. 10), the Court of Appeals has devised a remedial process that ousts the states from their historical control over the ratemaking at the intrastate level.

The end result is that if a party can obtain broader remedies than what Congress provided for under the FTA, why bother to sue under the FTA? Under *Ex parte Young*, parties can sue before, during, or after the approval or rejection of an interconnection agreement. The references to "state commissions" in the FTA would be inconsequential, and Section 252(e)(6) would become nothing more than a historical footnote. This is contrary to a basic rule of statutory

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stated that the "constructive experiment of *Parden* was ill conceived" and overruled "whatever may remain" of the doctrine's seminal decision in *Parden v. Terminal Ry. Of Alabama State Docks Dep't*, 377 U.S. 184 (1964). 527 U.S. at ___; 119 S. Ct. at 2228.

construction to give effect, if possible to every clause and word of a statute. *U.S. v. Menasche,* 348 U.S. 528, 538 (1955).

Allowing this action to proceed against individual Commissioners when the FTA mentions only the state commissions would be directly contrary to this Court's admonition in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997), to not "adhere to an empty formalism and [] undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." In addition, granting GTE an *Ex parte Young* remedy could raise Tenth Amendment concerns as the federal court, on behalf of an individual, assumed supervisory authority over a state commission. In short, because Congress expressly provided for a specific, limited form of relief to enforce "state commission" compliance with the FTA, there is no basis to infer that Congress intended to subject the individual state commissioners to the full range of remedial powers of a federal court under *Ex Parte Young. See, Seminole Tribe*, 517 U.S. at 74.

III. The Court of Appeals finding that federal district court jurisdiction exists under 28 U.S.C. § 1331 over any state commission telecommunications intrastate rate order that allegedly violates the FTA greatly expands federal court jurisdiction in the area of telecommunications far beyond anything expressed by Congress.

The Court of Appeals below held that the District Court had jurisdiction over GTE's complaint pursuant to 28 U.S.C. § 1331. 209 F.3d at 915. App. to Pet. 9a. That section provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution,

laws, or treaties of the United States." 28 U.S.C. § 1331. However, as the Court of Appeals noted, to establish a cause of action under § 1331, GTE must show that its action arises under statute or federal common law and that jurisdiction is not preempted by a more specific statutory provision conferring exclusive jurisdiction elsewhere. 209 F.3d at 916. App. to Pet. 10a. *See also, Connors v. Amax Coal Co., Inc.*, 858 F.2d 1226, 1229-1230 (7th Cir., 1988).

As noted in Argument II, *supra*, the FTA contains a remedial scheme that provides for only limited federal district court review. When Congress enacted the FTA, it specified the remedy for the violation of the statutory rights it created. Rather than respecting the remedy that Congress has expressly chosen, the Court of Appeals instead found that GTE could proceed against the Michigan Commissioners under the general federal question jurisdiction set forth in 28 U.S.C. § 1331. The problem with such a finding is that it goes against this Court's decision in *Seminole Tribe, supra:*

> In *Indiana Bell Telephone Co., Inc. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998), the district court explained that where Congress provides a means to seek review of an agency determination, alternative means of review are inapplicable. See *id.* at 1103 n. 2 (citing *Southwestern Bell Telephone Co. v. McKee*, No. Civ. A. 97-2197-EEO, 1997 WL 450041, *4 (D.Kan. July 15, 1997)). The decisions of these courts are persuasive. Indeed, a conclusion that such general jurisdiction exists would be contrary to *Seminole Tribe*, 517 U.S. 44, 116 S. Ct. 1114, which stands for the proposition that Congress's particular choices of remedy must be respected. Respect for congressional intent means that generalized statutes cannot be used in place of the tailored

> ones Congress has created. See *Wisconsin Bell*, 27 F. Supp. 2d at 1159-60.

Wisconsin Bell v. Public Service Comm'n of Wisconsin, 57 F. Supp. 2d 710, 718 (W.D. Wisc., 1999). In short, GTE cannot bypass the specific method that Congress has provided for simply by suing the Michigan Commissioners in federal district court under 28 U.S.C. § 1331.

The Court of Appeals justified its holding by stating that, since the MPSC's challenged order was in a state proceeding, not part of the interconnection agreement negotiation or arbitration process, it is not covered by the FTA. Additionally, the Court of Appeals found that since there was the "possibility" that GTE's federal claims might never be reviewed, the review procedure set forth in 28 U.S.C. § 1331 was "inadequate." Both findings are erroneous.

By holding that federal district court jurisdiction exists over any state commission intrastate rate order that allegedly violates the FTA, the Court of Appeals has greatly expanded federal district court jurisdiction far beyond anything expressed by Congress. In short, the Court of Appeals has blue-penciled in a federal court review process of state commission intrastate rate orders that Congress chose to withhold. Not only does this finding run counter to the regulatory scheme provided by Congress in the FTA, but it also contravenes the specific mandate of Congress, under the Johnson Act (28 U.S.C. § 1342) that state commission rate orders be kept out of federal courts "lock, stock and barrel". *See* Argument IV, *infra*. *See also, Tennyson v. Gas Service Co.*, 506 F.2d 1135, 1138 (10th Cir., 1974). Furthermore, as this Court has noted so long as there is no positive repugnacy between two laws a court must give effect to both and that any interpretations that render language superfluous are disfavored. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

This Court recently noted that:

> It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) and "fit, if possible all parts into a harmonious whole," *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

Food and Drug Admin. v. Brown & Williamston Tobacco Corp., ___ U.S. ___; 120 S. Ct. 1291, 1301 (2000).

Against this statutory scheme containing an express prohibition of federal jurisdiction, i.e. the Johnson Act, and another statute (the FTA) that specifies only a single mode of review of state commission orders, the Court of Appeals has found that general federal question jurisdiction under § 1331 exists for the district court to review intrastate rate orders of a state commission. If Congress had wanted to provide for the complete federal district court review of state commission intrastate rate orders, it would have stated so. Yet, there is no indication in the FTA that Congress intended such a result. Indeed, as this Court noted, ratemaking was one area of intrastate telecommunications regulation that Congress sought to preserve under state control. *See, AT&T v. Iowa Utilities Bd.*, 525 U.S. at 385, fn. 10.

The Court of Appeals' finding that federal district court jurisdiction under § 1331 is justified because the state commission order in question is not part of the negotiation or arbitration process is at odds with the facts. Despite the fact that GTE admitted that the tariffed rates for unbundled network elements would undoubtedly find their way into a final interconnection agreement,[4] the Court of Appeals nonetheless held that the MPSC's order was not covered by the FTA. Thus, the Court of Appeals chose to read this part of the FTA narrowly (i.e., because Congress did not specify that state commission rate orders - whose rates, terms, and conditions will be included in the final interconnection agreement - are part of negotiation or arbitration process, they're not covered by the FTA.) On the other hand, however, the Court of Appeals reads the FTA broadly to provide that all state commission orders that allegedly are contrary to the FTA are subject to federal court review even though FTA, Section 252(e)(6) provides for no such review.

The Court of Appeals' holding that review pursuant to the remedial scheme provided in the FTA is inadequate is premised on the possibility that, unless § 1331 jurisdiction is available, federal court review might never be available. Thus, rather than basing jurisdiction on the facts before it, the Court of Appeals justified its finding on a hypothetical set of facts. Finally, the Court of Appeals dismisses the suggestion that state court review of GTE's claims is adequate. The fact of the matter is that, even if the challenged tariffs were not included in a final interconnection agreement, those tariffs are subject to appellate review by Michigan courts. The Court of Appeals ignores the fundamental legal principle that federal district courts, as courts of original jurisdiction, have no general

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[4] On July 16, 1999, in Case No. U-11165, the MPSC approved a final interconnection agreement between GTE and AT&T that contained rates for unbundled network elements. GTE signed the interconnection agreement under protest.

appellate authority over state courts or state agencies. *See, Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-355 (1961); *Chicago, R. I. & P. R. Co. v. Stude*, 346 U.S. 574, 581 (1954). Cross-system appellate authority is entrusted solely with this Court, not to lower federal courts. Accordingly, state court review is entirely adequate.

IV. The Johnson Act, 28 U.S.C. § 1342, divests the federal district court of jurisdiction to hear GTE's complaint.

The Johnson Act, 28 U.S.C. § 1342, which divests the federal district court of jurisdiction to hear GTE's complaint, provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

Cases decided under the Johnson Act have recognized Congress's broad intention to keep ratemaking out of the federal courts. In *Tennyson v. Gas Service Co.*, 506 F.2d 1135, 1138 (10th Cir., 1974), the Tenth Circuit remarked:

> [B]y its [the Johnson Act] broad wording it is clear that it was intended to keep **constitutional challenges to orders affecting rates out of the federal courts "lock, stock and barrel"**, or as Professor Moore succinctly puts it, to effect a "general hands-off policy relative to state rate making". [footnote omitted]. The Act is not framed in terms of categories of plaintiffs, whether municipalities, state commissions, utilities or consumers, but in terms of enumerated conditions. Behind the Act were years of hostilities generated from jurisdiction in both the state and federal systems, removal of which was deemed desirable to the national policy. Thus the restriction imposed was far-reaching, going to jurisdiction itself. (Emphasis added.)

This case meets the criteria necessary for dismissal pursuant to the Johnson Act. GTE asserts jurisdiction is based on the Supremacy Clause, U.S. Const. art. VI, cl. 2. The MPSC's order does not interfere with interstate commerce since it addresses only issues dealing with the local telephone exchange, including the filing of state tariffs. The order in Case No. U-11281 was issued after reasonable notice and hearing. Further, a plain, speedy, and efficient remedy exists in the courts of the state as evidenced by the right to appeal orders of the MPSC directly to the court of appeals. *See,* Mich. Comp. Laws § 460.26. Therefore, all the requirements of the Johnson Act have been met.

The Court of Appeals, in this case, disagreed:

> Finally, the district court is not required to abstain from deciding this case under the Johnson Act, which prohibits federal courts

> from enjoining compliance with state orders affecting rates charged by a public utility only when, among other things, "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." 28 U.S.C. § 1342 (1994). The Johnson Act does not require abstention in this case because jurisdiction over GTE's claims is based on alleged violations of its rights under the FTA.

209 F.3d at 921. App. to Pet. 20a. The Court of Appeals below did not provide a citation to support its decision. Both GTE and the United States, however, had argued that it was well-established that a statutorily-based preemption claim does not provide a basis for invoking the Johnson Act to deprive a federal court of jurisdiction, citing *Freehold Cogeneration Assocs. v. Bd. of Regulatory Comm'rs,* 44 F.3d 1178, 1186 (3d Cir., 1995) and *Arkansas Power & Light Co. v. Missouri Pub. Service Comm'n,* 829 F.2d 1444, 1449 (8th Cir., 1987).

While this Court has yet to address the question, it is a matter that has been addressed by various circuits and should be addressed by this Court. This is particularly so because the text of the Johnson Act, with one specified exception, makes no distinction based on the type of constitutional challenge that is alleged. While some federal statutes, in the context of a preemption claim, have been found to be enforceable in federal district court and not barred by the Johnson Act, another federal statute, 42 U.S.C. § 1983, has been found unenforceable in federal district court and barred by the Johnson Act. To remedy this conflicting and erroneous approach to enforcement of the Johnson Act by the various Circuit Courts, this Court should grant review.

28 U.S.C. § 1342(1), on its face, makes no distinction with respect to what constitutional provision must be alleged in order to deprive a federal district court of jurisdiction. In 28 U.S.C. § 1342(2), Congress did, however, expressly identify the sole constitutional provision that may not be included in 28 U.S.C. § 1342(1). That is, a State rate order can not "interfere with interstate commerce." In other words, if a state rate order is claimed to violate the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, the Johnson Act may not be invoked to deprive a federal district court of jurisdiction to hear the complaint.

The express mention by Congress of a specific constitutional provision, i.e. Commerce Clause, as being excluded from inclusion in 28 U.S.C. § 1342(1) means all other constitutional provisions are included. In short, any decision that purports to authorize federal district court jurisdiction over a claim under the Supremacy Clause of the U.S. Constitution is decidedly at odds with the will of Congress that no other constitutional provision, except the Commerce Clause, be outside of the scope of 28 U.S.C. § 1342(1).

Both *Freehold* and *Arkansas Power*, the cases relied upon by GTE and the United States, are largely conclusory and find, without any serious consideration, that a preemption claim presents a statutory issue rather than a constitutional issue. Both cases rely mostly on court of appeals decisions that, in turn, and with little or no discussion cite other decisions as authority. Indeed, the only Court of Appeals decision that squarely addresses the question of whether preemption constitutes a constitutional issue or a statutory issue under the Johnson Act is *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Comm'n of Nevada*, 614 F.2d 206 (9th Cir., 1980). In that case, the Ninth Circuit noted that this question has elicited varying responses from this Court. It further noted that in *Kesler v. Dep't of*

Public Safety, 369 U.S. 153 (1962), this Court found preemption presented a constitutional issue. But three years later this Court in *Swift & Co. v. Wickham,* 382 U.S. 111 (1965) overruled *Kesler* finding that a preemption claim involving only a conflict between state law and federal statute should be regarded as a statutory issue. However, conceding that this conclusion was not compelled, this Court based its holding largely on "sound policy considerations" related to the purposes of the three-judge court requirement. 614 F.2d at 209 citing *Swift & Co., supra,* 382 U.S. at 126-129. The Ninth Circuit then stated:

> More recently, in *Hagans v. Lavine,* 415 U.S. 528, 533, 534 n.5 (1974), the Court did not regard *Swift & Co.* as having settled for all purposes the question of whether a conflict between state and federal law presents a statutory or constitutional issue. The context in which the issue there arose was whether the role of the Supremacy Clause in state-federal conflicts provided a basis for jurisdiction under the "secured by the Commission" language of 28 U.S.C. § 1343(3). Although *Hagans* deferred the decision on that question, the opinion suggested that the conflict issue, "although denominated 'statutory,' is in reality a constitutional claim arising under the Supremacy Clause." *Id.* at 549.

In *Hagans v. Lavine,* 415 U.S. 528, 532, fn. 5 (1974), this Court noted that the claim that a state law cannot be declared void by conflicting with a federal statute without resorting to the U.S. Constitution:

> For purposes of interpreting and applying 28 USC § 2281, the three-judge-court provision, a

> claim of conflict between federal and state law has been denominated a claim not requiring a three-judge court. *Swift & Co. v. Wickham,* 382 US 111 (1965). But Swift itself recognized that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution – "to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.,* at 125.

In determining whether a preemption claim constitutes a constitutional challenge for the purpose of the Johnson Act, the Ninth Circuit in *International, supra,* zeroed in on the word "solely" in 28 USC § 1342(1) and concluded that the Johnson Act withdraws jurisdiction only when it rests exclusively on repugnance to the Federal Constitution. 614 F.2d at 210-211. The Ninth Circuit then found that the Johnson Act did not apply to the case before it, which case involved the proper interpretation of the National Labor Relations Act and the jurisdiction therein provided as well as on general federal question jurisdiction (the jurisdictional amount having been met.) 28 U.S.C. § 1331. 614 F.2d at 211. Additionally, the Ninth Circuit based its conclusion on this Court's analysis of the legislative purpose of the three-judge court provision. Stating that the Johnson Act, adopted in 1934, was designed to further the same policies reflected in the three-judge court requirement that had been enacted in 1910, the Ninth Circuit relied upon the following statement by this Court in *Swift & Co.:*

> Their (the Congress') ire was aroused by the frequent grants of injunctions against the

> enforcement of progressive state regulatory legislation, usually on substantive due process grounds. . . . In contrast, a case involving an alleged incompatibility between state and federal statutes . . . involves more confining legal analysis and can hardly be thought to raise the worrisome possibilities that economic or political predilections will find their way into a judgment.

Swift & Co., 382 U.S. at 127. Thus, the Ninth Circuit concluded that "although a challenge to a rate order based on preemption may be regarded as constitutional for some purposes, it provides no basis for invoking the Johnson Act to deprive the district court of jurisdiction under the circumstances of this case. 614 F.2d at 211.

The problem with the Ninth Circuit's decision in *International* is that it interpreted the Johnson Act as if it were the same as the three-judge act statute that was under review. While it is true that both the three-judge act and the Johnson Act were designed to further the same policies, i.e. shielding state commission ratemaking from federal District Court interference, the Johnson Act was enacted because Congress was dissatisfied with the level of protection that the three-judge act provided. *See* 44 Yale L. J. 119, 125-127 (1934); *see also* 20 Iowa L. Rev. 128 (1934). In short, the three-judge act was viewed as not sufficiently shielding state commission ratemaking from federal District Court review. Thus, the Johnson Act was enacted to further restrict and limit federal District Court jurisdiction over state ratemaking and must be read as such.

Additionally, the existence of a federal "statutory" claim exists has not always saved a case filed in federal district court from dismissal under the Johnson Act. For example, in

J&A Realty v. City of Asbury Park, 763 F. Supp. 85 (D.N.J. 1991), the Plaintiff had brought suit in the federal district court claiming the defendants had violated its constitutional rights under both the federal and state constitutions and its statutory rights under 42 U.S.C. § 1983. The plaintiff argued that its suit was not subject to dismissal pursuant to the Johnson Act arguing that:

> allegations that defendants have violated 42 USC § 1983 constitutes a "statutory" claim based on federal law which precludes the application of the Johnson Act, since jurisdiction is not based "solely" upon the orders repugnance to the Federal Constitution.

763 F. Supp. at 88. The Court disagreed, stating:

> A plaintiff may not use § 1983 as an "end run around the Johnson Act." *Peoples Nat'l Utility Co. v. Houston*, 837 F.2d 1366, 1368 (5th Cir. 1988); *Louisiana Power & Light*, 666 F. Supp. at 447; *Kalinsky*, 484 F. Supp. 176; *South Central Bell Telephone Co.*, 420 F. Supp. 376; *Zucker*, 373 F. Supp. 748; *Tennyson v. Gas Service Co.*, 367 F. Supp. 102, 104 (D. Kan. 1973) *aff'd* 506 F.2d 1135 (10th Cir. 1974).

763 F. Supp. at 88. Thus, in at least two circuits the fact that a "statutory" claim exists is not sufficient to override the Johnson Act or ignore the fact that enforcement of the federal statute against a rate order of a state commission has, as it basis, a repugnance to the Federal Constitution.

In conclusion, when Congress enacted the Johnson Act, it provided in 28 U.S.C. § 1342(1) that a federal district court was to be denied jurisdiction to review any challenge to a rate

order of a state commission that was based on the claim that it violated the Federal Constitution. In 28 U.S.C. § 1342(2), Congress identified the single exception to that statutory bar. That is, if a state rate order was alleged to violate the Commerce Clause of the U.S. Constitution, a federal district court would not be divested of jurisdiction to hear the case. Under the familiar maxim of statutory construction, *expressio unius est exclusio alterius,* the express mention of a single constitutional provision that would vest a federal district court with jurisdiction should be deemed to exclude challenges to state rate orders in federal district court based on any other constitutional provision. Furthermore, the division of a preemption question into a "constitutional" issue and "statutory" issue not only constitutes a rewrite of 28 U.S.C. § 1342(1) but is suspect given the disparate treatment accorded to claims of "statutory" violations under 42 U.S.C. § 1983. The District Court lacked jurisdiction to hear this case under the Johnson Act and the Court of Appeals erred in finding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: July, 2000

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GTE North, Inc.,

Plaintiff-Appellant,

No. 98-1851

v.

John G. Strand, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Michigan at Lansing.
No. 98-00038--Robert Holmes Bell, District Judge.

Argued: December 13, 1999

Decided and Filed: April 20, 2000

Before: BOGGS and NORRIS, Circuit Judges; and FEIKENS, District Judge.*

COUNSEL

ARGUED: Patrick F. Philbin, KIRKLAND & ELLIS, Washington, D.C., for Appellant. David A. Voges, OFFICE OF THE ATTORNEY GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellees. Charles W.

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* The Honorable John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, D.C., for Intervenors. **ON BRIEF:** Patrick F. Philbin, KIRKLAND & ELLIS, Washington, D.C., for Appellant. David A. Voges, Henry J. Boynton, OFFICE OF THE ATTORNEY GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellees. Charles W. Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, D.C., for Intervenors. Stephen F. Smith, David L. Lawson, Peter D. Keisler, SIDLEY & AUSTIN, Washington, D.C., for Amici Curiae.

OPINION

BOGGS, Circuit Judge. GTE North, Inc. (GTE), an incumbent local telecommunications carrier in Michigan, sued the defendants, members of the Michigan Public Service Commission (MPSC or the Commission), under the Federal Telecommunications Act of 1996 (FTA or the Act) after the Commission issued an opinion and order directing GTE to (1) publish tariffs in which GTE would offer to sell elements of its telecommunications network at rates predetermined by the Commission, and (2) allow competitors to purchase pre-assembled platforms of GTE network elements. In its complaint, GTE alleged that the MPSC's order conflicted with, and was preempted by, the FTA, and that enforcement of the order infringed GTE's statutory rights in violation of 42 U.S.C. § 1983.

GTE moved for summary judgment, and the defendants filed a cross-motion to dismiss for lack of subject matter jurisdiction. The district court granted the defendants' motion and dismissed the case without prejudice, holding that it did not have jurisdiction to review the MPSC's order under 42 U.S.C. § 252(e)(6), the FTA provision limiting federal judicial review of state commission orders approving or rejecting final

interconnection agreements, because the challenged directive was merely an interlocutory order. See 42 U.S.C. § 252(e)(6) (1996). GTE timely appealed the district court's decision to this court.

Based on the language and legislative history of § 252(e)(6), we conclude that the limitations on federal review set forth in that provision do not apply in this case, and that the district court has general federal question jurisdiction under 28 U.S.C. § 1331 to hear GTE's challenge to the February order.

I

Before addressing the basis for the district court's jurisdiction over GTE's claims, it is necessary briefly to describe the administrative context in which the MPSC issued the challenged order. In the spring of 1996, AT&T and Sprint attempted to negotiate an interconnection agreement with GTE pursuant to § 251 of the FTA. Congress passed the Act in 1996 in an effort to promote competition in local telephone markets by ending regulated monopolies previously enjoyed by incumbent local exchange carriers (LECs) such as GTE. Before Congress enacted the FTA, state public utility commissions regulated local telecommunications markets by granting companies that incurred the expense of establishing local networks the exclusive right to provide service in the areas covered by their systems. In exchange for this privilege, LECs allowed the state commissions to regulate local service rates. The FTA altered this practice and addressed the underlying problem of anti-competitive local telecommunications markets in two ways: it preempted state commissions' authority to grant service monopolies, and obligated incumbent LECs to provide competitors with network access.

Although the FTA circumscribes state commissions' power to regulate local markets, it does not exclude state commissions from the FTA approval process. To the contrary,

it invests them with authority to approve or reject interconnection agreements negotiated in accordance with the Act, which requires LECs to permit rival carriers to: (1) utilize the LEC's network and facilities; (2) purchase unbundled network elements from the LEC; and (3) purchase at wholesale rates any telecommunications service that the LEC provides at retail to subscribers who are not telecommunications carriers. *See* 47 U.S.C. §251(c)(2)-(4) (1996); *see also id.* § 252 (establishing procedures for negotiation, arbitration, and approval of interconnection agreements). To facilitate new competitors' entry into local markets, the FTA outlines specific procedures that LECs and new market entrants must follow in negotiating, arbitrating, and approving interconnection agreements. *See generally id.* §252 (1996). LECs and their competitors may negotiate interconnection agreements voluntarily, through mediation, or through compulsory arbitration before a state utility commission. *See id.* § 252(a)-(b) (1996). When a final agreement is reached, the telecommunications or public utility commission for the state in which the LEC is located must approve or reject the agreement. *See id.* § 252(e) (1996).

Once a state commission rules on a proposed agreement, Section 252(e)(6), the FTA provision at issue in this case, authorizes any aggrieved party to "bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251." *Id.* § 252(e)(6) (1996). If a state commission fails to approve or reject a proposed agreement within a certain time - 30 days from the date of submission if the agreement resulted from compulsory arbitration, or 90 days from the date submitted if the agreement resulted from voluntary negotiation or mediation - the Federal Communications Commission (FCC) may preempt the state commission's jurisdiction and rule on the validity of the agreement. *See id.* § 252(e)(4) - (5) (1996).

In this case, AT&T and Sprint petitioned the MPSC for compulsory arbitration under § 252 when the negotiations they

began with GTE in 1996 did not produce an agreement. In March 1997, before a final agreement was reached, GTE filed a complaint in federal district court alleging that an order issued by the MPSC on January 15, 1997, concerning GTE's interconnection obligations to Sprint and AT&T violated the FTA. The district court dismissed GTE's complaint, holding that it did not have subject matter jurisdiction to review the challenged order because it was not an order approving or rejecting a final interconnection agreement. *See GTE North v. Strand*, No. 5:97-CV-20 (W.D. Mich. June 2, 1997) (citing 47 U.S.C. § 252(e)(6)).

Then, while arbitration proceedings between GTE, Sprint, and AT&T were still pending, the MPSC initiated unrelated state law proceedings against GTE and other incumbent LECs in order to establish terms of interconnection to Michigan local exchange networks generally. These proceedings concerned GTE as an LEC, but not specifically as a party to the AT&T and Sprint arbitration. In connection with these general interconnection proceedings, the MPSC required GTE and Ameritech, as Michigan LECs, to file with the Commission "Total Service Long Run Incremental Cost" (TSLRIC) studies for both regulated and non-regulated telecommunications services. In addition, the MPSC directed GTE to publish tariffs in which GTE would offer to sell its network elements and wholesale services to any interested party at rates predetermined by the Commission. GTE responded to the Commission's order by filing a petition for rehearing in which GTE challenged the MPSC's rates for unbundled loops as confiscatory in violation of the FTA. The MPSC denied GTE's petition for rehearing, and GTE appealed the MPSC's order to the Michigan Court of Appeals. On December 30, 1997, the court affirmed the MPSC's order, and the MPSC proceeded to use GTE's and Ameritech's TSLRIC studies to determine prices for new entrants' access to bundled and unbundled network elements and basic local exchange services throughout Michigan.

On February 25, 1998, in the course of the state proceedings against GTE and Ameritech, the MPSC issued the order contested in this appeal. In the February 25 order, the MPSC used GTE's TSLRIC studies to establish the rates at which GTE would be compelled to sell unbundled network elements to its competitors. In addition, the order stated that the FTA requirement that GTE allow competitors to access pieces, or unbundled elements, of GTE's local network did not preclude GTE's competitors from requesting access to pre-assembled, fully operational local service platforms. Upon receiving the order, GTE sued the MPSC in the district court, alleging that the Commission, acting pursuant to Michigan law, violated the FTA when it issued the February 25 order:
(1) directing GTE to provide competitors with access to pre-assembled, fully operational service platforms; and
(2) requiring GTE to publish tariffs offering to sell elements of its network at rates predetermined by the Commission.

In its motion for summary judgment, GTE argued that the Commission's mandate directing GTE to provide competitors with access to pre-assembled network platforms violated § 251(c)(3) of the FTA because that provision requires LECs to provide competitors with access only to "*unbundled* network elements." 47 U.S.C. § 251(c)(3) (1996) (emphasis added). According to GTE, Congress deliberately limited incumbent LECs' obligation to grant competitors network access by requiring LECs to provide competitors only with "unbundled," or separated, network elements that the new carrier would have to assemble before it could provide service. *Ibid.* In addition, GTE argued that the portion of the February order directing it to offer pre-assembled platforms to all potential competitors violated the FTA because the Act specifically states that only competitors who *request* unbundled access ("requesting carriers") are entitled to network access under § 251(c)(3), and then only after negotiating individual interconnection agreements. *See ibid.* GTE made a similar argument in challenging the MPSC's second directive, which, according to GTE, violates the FTA

because it requires LECs to publish tariffs offering to sell network elements to *all* interested competitors at predetermined rates even though §§ 251 and 252 of the Act specifically require competitors to negotiate individual terms of access with LECs.[1] *See* 47 U.S.C. § 252(c)(2)-(3) (1996).

Although GTE's claims raise interesting questions about the scope and applicability of certain provisions of the FTA, the district court did not address these arguments on the merits because it determined that it lacked jurisdiction under § 252(e)(6) to review the MPSC's February 25 order. In its July 1998 ruling, the court dismissed GTE's claims for declaratory and injunctive relief on the basis that § 252(e)(6) precludes federal review where a state commission has not yet issued a final order approving or rejecting an interconnection agreement. GTE argues on appeal that the district court erred in dismissing the case for lack of subject matter jurisdiction because the district court had general jurisdiction under 28 U.S.C. § 1331 to hear GTE's claims. In deciding this appeal, we express no opinion on the merits of GTE's claims and determine only whether the district court has jurisdiction to entertain GTE's challenge to the February 25 order.

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[1] Although GTE claims that it will be disadvantaged if its competitors are not required to negotiate individual terms of network access, any harm GTE may suffer on this score will arguably be temporary because universal subsidies are due to be phased out under the FTA. Cf. AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721, 737 (1999) (upholding an FCC rule that the plaintiffs said would "eviscerate the distinction between resale and unbundled access" and amount to "government-sanctioned arbitrage" on the grounds that the rule was consistent with the FTA, and noting that, because "§ 254 requires that universal service subsidies be phased out, . . . whatever possibility of arbitrage remains will be only temporary").

The counter-argument is, of course, that even if the tariffing requirement established in the February 25 order were struck down once the Commission approved an agreement incorporating the terms set forth in the tariffs, GTE could not recover damages for harm suffered in the interim, nor could it "turn back the clock and recreate the atmosphere of negotiations that would have prevailed if [its competitors] had not been operating for months under tariffing arrangements." Appellant's Br. at 24-25.

II

This court reviews de novo the district court's denial of GTE's motion for summary judgment. *See Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996). We also review de novo the district court's decision to dismiss GTE's complaint for lack of subject matter jurisdiction. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249, 252 (1986); *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). Lack of subject matter jurisdiction is an affirmative defense that a defendant may assert in a motion to dismiss. See Fed. R. Civ. P. 12(b)(1); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (emphasizing that to survive a motion to dismiss, a complaint must contain "either direct or indirect allegations respecting all material elements to sustain a recovery under some viable legal theory").

The party opposing dismissal has the burden of proving subject matter jurisdiction. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Specifically, the non-moving party must show that the complaint "alleges a claim under federal law, and that the claim is 'substantial.'" *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (holding that a complaint is "substantial" unless "prior decisions inescapably render [it] frivolous"). That is to say, the non-moving party will survive the motion to dismiss by showing "any arguable basis in law" for the claims set forth in the complaint. Ibid. In conducting our review, we "construe the complaint in a light most favorable to the plaintiff, accept as true all of plaintiff's well-pleaded factual allegations, and determine whether the plaintiff can prove no set of facts supporting [his] claims that would entitle him to relief." *Ludwig v. Board of Trustees of Ferris State Univ.*, 123 F.3d 404, 408 (6th Cir. 1997). We review for clear error any factual findings the district court made in deciding the motion to dismiss. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 161 (6th Cir. 1993).

Jurisdiction Over the Challenged Order

Based on the scope of the applicable statutory provisions and the nature of the challenged order, we conclude that the district court has general jurisdiction pursuant to 28 U.S.C. § 1331 to hear GTE's claims. Section 252(e)(6), which prohibits federal review of interlocutory orders entered in the course of FTA proceedings, plainly does not preclude review of the February 25 order, which was entered in an independent state law proceeding unrelated to the AT&T-Sprint arbitration. Moreover, even if one could interpret § 252(e)(6) to encompass GTE's claims, to do so would frustrate Congress's intent by allowing state commissions to insulate from federal review decisions allegedly preempted by, or otherwise contrary to, federal telecommunications law. We therefore reverse the district court's order dismissing GTE's complaint, but express no opinion on whether the order directing GTE to sell pre-assembled platforms and other network elements at predetermined rates is preempted by the FTA.[2] We similarly express no opinion on whether the portion of the February 25 order directing GTE to sell network elements to any interested competitor at rates predetermined by the Commission is preempted by the FTA requirement that competitors obtain access to local networks by negotiating individual interconnection agreements.[3]

To survive a motion to dismiss based on lack of federal question jurisdiction, the non-moving party must show first

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[2] Section 261 of the FTA provides that state commissions can impose their own rules "in fulfilling requirements of this part, if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261 (1996). State commissions may also impose additional requirements on LECs if such requirements "are necessary to further competition in the provision of telephone exchange access, so long as the State's requirements are not inconsistent with the [Federal Communication] Commission's regulations to implement this part." *Id.* § 261 (b)-(c).

[3] *See* 47 U.S.C. §§ 251(a)(1), 251(c)(1) (requiring incumbents and their competitors to negotiate in good faith the specific terms and conditions of interconnection agreements).

that its claims arise under federal law and, second, that § 1331 jurisdiction is not "preempted by a more specific statutory provision conferring exclusive jurisdiction elsewhere." *Connors v. Amax Coal Co.*, 858 F.2d 1226, 1229-30 (7th Cir. 1988). GTE asserts that the district court has subject matter jurisdiction over its 42 U.S.C. § 1983 and federal preemption claims because: (1) such claims arise under the Constitution and laws of the United States; and (2) the MPSC's February 25 order, which the parties agree was issued pursuant to Michigan law, deprives GTE of its rights under the FTA, thereby creating a cause of action for prospective injunctive relief against the commissioners under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). We agree.

Because GTE's claims arise under federal law, the district court has jurisdiction under § 1331 to decide the case unless GTE's claims are subject to the limitations on federal review set forth in § 252(e)(6), which we conclude they are not. See 47 U.S.C. § 252(e)(6) (1996); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (holding that a plaintiff who "seeks injunctive relief from a state [or local] regulation on the ground that such regulation is preempted by federal law . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve"). Federal question jurisdiction over GTE's claims is not preempted by the FTA because § 252(e)(6) only circumscribes federal judicial review of interlocutory orders issued in FTA, not state law, proceedings. *See Connors*, 858 F.2d at 1229-30.

The text and legislative history of the FTA make clear that § 252(e)(6) is the exclusive basis for federal judicial review only of orders entered in negotiation or arbitration proceedings under § 252 of the Act. Section 252(e)(6) provides that, "[i]n any case in which a State commission makes a determination *under this section*, any party aggrieved by such determination may bring an action in an appropriate federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this

section." 47 U.S.C. § 252(e)(6) (1996) (emphasis added). Because the MPSC initiated the state law proceedings that resulted in the challenged order independent of the procedures prescribed in the FTA, § 252(e)(6) does not limit federal judicial review of the February 25 order, and the MPSC's failure, thus far, to incorporate the terms of the order in a final decision approving or rejecting an interconnection agreement does not bar review of GTE's claims.

In holding that GTE's suit was premature because the MPSC had yet to issue a final order reviewable under § 252(e)(6), the district court relied heavily on its prior decision in *GTE North v. Strand*, No. 5:97CV01, 1997 WL 811422 (W.D. Mich.),[4] and in so doing failed to recognize the legal significance of the February 25 order's state law origins. As the district court implicitly acknowledged in *Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817, 823 (W.D. Mich. 1998), *Strand* stands for the limited proposition that federal district courts have "no jurisdiction to review MPSC decisions arising *during* the § 252 *process* until after [an] interconnection agreement ha[s] become final by way of commission approval or rejection." *Ibid.* (citing cases) (emphasis added). The court in *MFS* thus distinguished *Strand* and upheld jurisdiction over the plaintiff's challenge to an MPSC order interpreting (rather than approving or rejecting) an existing interconnection agreement. See id. at 823-24; *cf. Michigan Bell Telephone v. Strand*, 26 F. Supp. 2d 993, 999 (W.D. Mich. 1998) (emphasizing the "Congressionally assigned role of the district courts in preventing violations of the Telecommunications Act flowing from enforcement decisions or other decisions inconsistent with existing interconnection agreements"). In this case, as in *MFS*, the challenged order did not arise "during the § 252 process," and is therefore not subject to the reasoning in Strand or the many

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[4] In *Strand*, the district court noted that an MPSC order is a "determination" subject to federal review under section 252(e)(6) only if the order approves or rejects a final interconnection agreement. *See Strand*, 1997 WL 811422, at *2 (quoting *GTE South v. Morrison*, 957 F. Supp. 800, 804 (E.D. Va. 1997)).

other cases cited by the lower court in which district judges have refused to review interlocutory orders issued by state commissions in the course of § 252 arbitrations. Id. at 823.

Although the order at issue in this case is clearly distinguishable from an interlocutory order entered in a § 252 proceeding, the commissioners urge us to overlook the order's state law origins because the order establishes rates that the parties agree will likely be incorporated in a final agreement subject to review under § 252(e)(6). Were we to adopt this approach, we would simply equate the February 25 order with an interlocutory order in a § 252 proceeding that GTE could not challenge in federal court until the Commission issued a final decision approving or rejecting an agreement incorporating the terms of the order. Recharacterizing the February 25 order in this manner appears consistent with the FTA if one reads § 252(e)(6) broadly to govern not only claims that a state utility commission erred in approving a final agreement negotiated under § 252, but also claims that the commission violated the FTA by approving an agreement that was not the product of a § 252 proceeding. Although this construction of § 252(e)(6) is superficially appealing, we cannot adopt this approach and assume that GTE would eventually be able to seek federal review of the challenged order because any approach that equates a decision arising out of independent state law proceedings with an interlocutory order in a § 252 arbitration ignores the critical fact that the former may be enforced against the parties even if it is never incorporated in a final interconnection agreement.

At first blush, § 252(e)(6) seems to guarantee adequate, albeit deferred, judicial review of the Commission's February 25 order. *See, e.g., Thunder Basin Coal v. Reich*, 510 U.S. 200 (1994) (holding that a statutory provision that places temporal restrictions on a party's ability to bring an action in federal court still provides adequate opportunity for review and therefore satisfies due process). As the district court noted in its opinion, the parties agree that the rates established in the

Commission's February 25 order will likely be incorporated into a final arbitration agreement. Standing alone, this admission appears to undercut GTE's argument that the district court has jurisdiction over its claims under § 1331. Indeed, when combined with the Commission's assertion that it has been prevented from ruling on an agreement incorporating the challenged terms because GTE has not made certain filings, the parties' admission virtually guarantees that, if GTE were to execute an agreement, either the MPSC or the FCC would approve or reject the terms of the challenged order, at which point GTE could seek federal review under § 252(e)(6). *See* 47 U.S.C. § 252(e)(1) (1996) (stating that a state commission "shall" approve or reject "any" interconnection agreement between an incumbent and a requesting carrier, whether the agreement is the product of voluntary negotiation or binding arbitration before the state commission). The problem with this logic, and the reason § 252(e)(6) does not provide for adequate review of the challenged order under *Califano v. Sanders*, 430 U.S. 99, 108 (1977), or even under *Thunder Basin*, 510 U.S. 200 (1994), is that an interested buyer could enforce the tariffs established in the February order in the Michigan courts without ever executing a final interconnection agreement with GTE.

In determining whether the lower court has jurisdiction over GTE's claims despite the limitations in § 252(e)(6), this court must look "not only [to] the particular statutory language, but to the design of the [FTA] as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Citing the Supreme Court's decision in *Califano*, the district court correctly observed that, "[w]here Congress has provided an adequate procedure to obtain review of an agency determination, alternative bases for jurisdiction are inapplicable." *Califano*, 430 U.S. at 108. The district court noted in its opinion that confining federal review of GTE's claims to the circumstances outlined in § 252(e)(6) might theoretically deprive GTE of "adequate" review under *Califano* because such review would be contingent upon the MPSC's

approval of a final agreement incorporating the February 25 order. However, the court found that the probability that the order would be incorporated into a final agreement was so strong as to eliminate the contingency and virtually guarantee judicial review.

We disagree, and find that in this case § 252(e)(6) cannot be relied upon to provide adequate federal review because there is a chance, regardless how small, that GTE's competitors may obtain service from GTE on the terms set forth in the February 25 order *without ever executing* a final agreement. Indeed, we think the appropriate inquiry is not whether, in the court's estimation, it is more likely than not that the challenged order will be incorporated into a reviewable agreement, but whether there is any possibility at all that an LEC's competitors could enforce the terms of the challenged order by means other than those prescribed in the FTA. If there is such a chance, § 252(e)(6) does not provide the party challenging the order with adequate review under *Califano*, and the federal district courts have general jurisdiction to review the order under 28 U.S.C. § 1331.

Under Michigan law, a buyer interested in purchasing network elements from GTE at the rates established in the February order need not execute a final interconnection agreement with GTE to enforce the tariff; it need only petition a state court for an injunction enforcing the terms of the tariff against GTE. *See, e.g., Rinaldo's Construction Corp. v. Michigan Bell Telephone Co.*, 559 N.W.2d 647, 653-54 (Mich. 1997). In *Rinaldo's*, the Michigan Supreme Court held:

> [W]here a plaintiff seeks relief against a telephone company in a [state] court of general jurisdiction, under *Valentine [v. Michigan Bell*, 199 N.W.2d 182 (Mich. 1972)], the court may entertain (1) a cause of action in tort, or (2) *a claim that the telephone company has violated the regulatory code or tariffs*.

Id. at 653-54 (emphasis added). As the Michigan Supreme Court went on to explain, "[c]auses of action in tort and those causes of action alleging that a telephone company has violated the tariffs or code are not cases in which the rationale underlying the doctrine of primary jurisdiction [requires the state courts to defer to the MPSC]." *Id.* at 654. Because an interested buyer need not incorporate the terms of the February 25 order into a final arbitration agreement to enforce GTE's obligations under the order, § 252(e)(6) does not provide an "adequate procedure" by which GTE may obtain review of the MPSC's directives. That GTE could contest the validity of the February 25 order in the course of defending a state court enforcement proceeding does not solve the problem, because leaving resolution of GTE's claims to the state courts would clearly frustrate Congress's goals under the FTA. *See, e.g., MFS Intelenet*, 16 F. Supp. 2d. at 823-34 (concluding that review of § 252 "as a whole" demonstrates that "Congress has created a unique framework which, while inviting state commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure that those agreements meet federal requirements").

The district court has subject matter jurisdiction under § 1331 to review federal preemption claims. *See Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559 (6th Cir. 1998). The question in this case is simply whether § 252(e)(6) divests the district court of its jurisdiction over GTE's preemption claims because the February 25 order, though itself a product of state law proceedings, establishes rates that might one day be incorporated into final arbitration agreements approved by the MPSC. There is no evidence that Congress intended § 252(e)(6), which grants federal courts exclusive jurisdiction to review for FTA compliance state commission orders approving or rejecting interconnection agreements, to preclude federal review of state law orders that permit telecommunications carriers to circumvent the procedures prescribed in the FTA for

negotiating network access. We recognize, of course, that the significance of the challenged order's state law origins has engendered legitimate debate among the parties and in the district court. However, absent clear evidence that Congress intended to allow state commissions to issue orders that may be enforced without being incorporated into final interconnection agreements, we will not construe § 252(e)(6) to preclude federal review of preemption challenges to state commission orders issued in non-FTA proceedings.

Indeed, to hold to the contrary would have enormous negative implications: if only certain actions (final orders approving interconnection agreements) by state commissions are reviewable in federal court, and if, as the district court held, § 252(e)(6) is the exclusive basis for judicial review of state commission actions that in any way relate to interconnection agreements, state commissions may insulate regulatory requirements that violate the FTA from federal, and possibly even state, court review. This interpretation of § 252(e)(6) conflicts with Congress's decision to establish federal procedures for negotiating interconnection rights and to concentrate judicial review of interconnection agreements in the federal courts. It is also antithetical to the principle that parties injured by a governmental entity's failure to adhere to the law may seek redress in the courts. Finally, denying review and forcing GTE either to violate the February 25 order, or to comply with the general and immediate obligations imposed by the order in the hope that the order would one day be incorporated into a reviewable final agreement, would undermine both the letter and spirit of the FTA.

Section 252(e)(6) circumscribes federal review only of cases born of § 252 proceedings. Because the MPSC's February 25 order was not the product of § 252 arbitration, but of an independent state law proceeding, § 252(e)(6) does not preclude jurisdiction over GTE's claims. We therefore hold that federal review is available under § 1331 to determine whether state commission orders violate federal law except in cases in

which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings. We confine our holding to the jurisdictional question because it is for the district court to determine on remand whether the directives in the February 25 order violate § 252 of the FTA as recently interpreted by the Supreme Court in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).[5]

III

The MPSC argues that, even if we have jurisdiction over GTE's claims, it would be prudent for us to abstain from ruling on the merits of the case until the rates specified in the February 25 order are incorporated into an interconnection

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[5] In *Iowa*, the Supreme Court reversed the Eighth Circuit's decision vacating, as inconsistent with the private negotiation provisions of the FTA, the FCC's "pick-and-choose" rule, which required incumbents to offer network access to any potential competitor on the same terms enjoyed by earlier competitors who negotiated individual agreements with the incumbent. The Eighth Circuit vacated the rule on the basis that it allowed late market entrants to obtain the benefits of previous competitors' agreements without having to accept the trade-offs that the initial competitors had to make in order to obtain favorable terms of access. See id. at 738. In reversing the Eighth Circuit and upholding the rule, the Supreme Court rejected the argument that the rule undercut incumbents' bargaining power and contravened the purpose of the negotiation provisions of the FTA, and affirmed the FCC's authority to promulgate the rule on the basis that it tracked the language of a particular FTA provision (§ 252(i)) "almost exactly."

In the same opinion, the Supreme Court also reversed the Eighth Circuit's decision vacating FCC Rule 315(b), which prohibits incumbent LECs from separating already combined network elements before leasing them to competitors under the "unbundled access" provisions of the FTA. The Eighth Circuit determined that the rule should be vacated because it required leased access to "bundled" elements, in violation of the FTA. The Supreme Court disagreed, finding that, although § 251(c)(3) directs incumbents to grant competitors access to "unbundled" elements that the competitors may then "combine" and thus "forbid[s] incumbents to sabotage network elements that are provided in discrete pieces," § 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *Iowa*, 119 S. Ct. at 737. Noting that "§ 251(c)(3) is ambiguous on whether leased network elements may or must be separated," the Court concluded that the FCC's rule, which effectively requires incumbents to lease "bundled" elements to competitors under certain circumstances, "is entirely rational" even though the rule "could allow entrants access to an entire preassembled network." *Id.* at 737-38.

agreement approved by the Commission. We decline to express an opinion on the merits of GTE's claims, but not on the grounds urged by the defendants. Although the Michigan courts have concurrent jurisdiction over GTE's § 1983 and preemption claims, we should decline to decide this case only if the requirements for abstention established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *Younger v. Harris*, 401 U.S. 37 (1971), or *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), are met, or if abstention is warranted under the Johnson Act, 28 U.S.C. § 1342 (1994).

Burford abstention is appropriate where "timely and adequate state-court review is available" and:

(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or

(2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (*NOPSI*). Although the MPSC was arguably trying to establish a "coherent policy" concerning local interconnection rates, Michigan state law clearly authorizes the dictates in the Commission's February 25 order. Because Congress has invested the federal courts with primary responsibility for adjudicating FTA challenges to state telecommunications regulations, and because this case does not concern a disputed issue of state law, but rather a potential conflict between state and federal telecommunications laws, *Burford* abstention is inappropriate. *See, e.g.*, *NOPSI*, 491 U.S. at 361 (holding *Burford* abstention inappropriate because the plaintiffs' case did not "involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state law that must be untangled before the federal

case can proceed") (internal quotation marks and citation omitted).

Pullman abstention is similarly inappropriate because *Pullman* abstention is warranted only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question. *See, e.g., Babbit v. United Farm Workers National Union*, 442 U.S. 289, 306 (1979) (interpreting *Pullman*). In this case, to abstain pending state review of GTE's claims would be inappropriate because the dictates of the Michigan Telecommunications Act (pursuant to which the MPSC issued the challenged order) are clear and the MPSC has already considered GTE's objections to the February 25 order, denied them, and denied GTE's request for rehearing.

Younger abstention is also inappropriate. In *Younger*, the Supreme Court held that federal courts should abstain from deciding cases within their jurisdiction only when: (1) there are ongoing state court proceedings; (2) those proceedings involve important state interests; and (3) the parties have an adequate opportunity to raise constitutional issues in the state proceedings. *See GTE MobileNet of Ohio v. Johnson*, 111 F.3d 469, 481 (6th Cir. 1997). The MPSC contends that all three conditions for Younger abstention are met, and emphasizes that state proceedings are currently ongoing despite the Michigan courts' rejection of GTE's claims because GTE has a right pursuant to Mich. Comp. Laws § 462.26 to seek review of the Commission's February 25 order (and the Commission's May 11, 1998, order denying rehearing) in the Michigan Court of Appeals.

That GTE has a right to appeal does not, however, satisfy the requirement that a federal court may abstain under Younger only if the parties are involved in ongoing state proceedings. The Supreme Court held in *NOPSI* that the

availability, or even the pendency, of state court review of a "legislative or executive action" does not justify *Younger* abstention. *NOPSI*, 491 U.S. at 368 (noting that requiring abstention in deference to state judicial proceedings reviewing "legislative or executive action" would "make a mockery of the rule that only exceptional circumstances justify [abstention]"). Because the MPSC's February order cannot be described as "judicial" in nature, *Younger* does not require this court to abstain from ruling on the merits of GTE's claims. *See id.* at 371 (holding that a "judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," and concluding that the "establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind"). Indeed, *Younger* abstention would be especially inappropriate in this case because the Michigan Court of Appeals has already considered and rejected the merits of GTE's challenge to the MPSC's 1997 orders. *See GTE North, Inc. v. MPSC*, No. 198324 (unpublished opinion, December 30, 1997) (affirming over GTE's objection the rates established in the MPSC's order in case U-10860 and affirming the MPSC's directive to conduct the cost study proceedings that gave rise to the dispute in this case).

Finally, the district court is not required to abstain from deciding this case under the Johnson Act, which prohibits federal courts from enjoining compliance with state orders affecting rates charged by a public utility only when, among other things, "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." 28 U.S.C. § 1342 (1994). The Johnson Act does not require abstention in this case because jurisdiction over GTE's claims is based on alleged violations of its rights under the FTA.

In addition to the fact that the requirements for abstention established by the Supreme Court are not satisfied in this case, abstention is not warranted here because waiting to

review the propriety of the February 25 order until it is incorporated into a final arbitration agreement will deny GTE a timely and adequate remedy at law. GTE, whose suit against the MPSC is based on *Ex parte Young*, 209 U.S. 123 (1908), cannot recover damages for injuries sustained under the challenged order. Because *Young* limits GTE's recovery to prospective injunctive relief, waiting to decide this case until the Commission approves a final agreement incorporating the challenged terms may well deny GTE a timely and adequate remedy by precluding recovery for harm sustained while the order was in effect.[6]

For the foregoing reasons, abstention is not warranted in this case.

IV

In holding that GTE's claims fell within the purview of § 252(e)(6), the district court effectively denied GTE any assurance of federal review because under § 252(e)(6), federal

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[6] GTE was prudent to sue the Michigan commissioners under *Ex parte Young* because it is virtually certain that a state utility commission's decision to accept regulatory authority under the FTA cannot legitimately be construed as a valid waiver of sovereign immunity. The Supreme Court's recent decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S. Ct. 2199, and *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2219 (1999), undermine earlier circuit court decisions holding that the Eleventh Amendment does not bar suits against state utility commissions because such commissions constructively waive their immunity from suit by participating in the regulatory scheme established by the FTA. *See, e.g., MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 567, 567-68 (7th Cir. 1999) (granting a petition for rehearing and directing the parties to file supplemental briefs on the impact that the Supreme Court's decisions in *Alden v. Maine*, 119 S. Ct. 2240 (1999), and the *College Savings Bank* cases had on the court's earlier decision).

It is precisely because the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions that we disagreed in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862 (6th Cir. 2000), with the Seventh Circuit's decision in MCI and premised our conclusion that the plaintiff could proceed with its suit against the MPSC solely on *Ex parte Young*, rather than waiver, grounds.

review is wholly contingent on a state commission's decision to approve or reject a final interconnection agreement incorporating the terms of any challenged order, an event that need not occur for a competitor to enforce the tariffs established in the February 25 order against GTE. The challenged order was the product *not* of § 252 proceedings, but of proceedings initiated by the MPSC under Michigan law, and as such may be independently enforced by the Michigan courts. The district court therefore erred in concluding that § 252(e)(6) provides an adequate opportunity for deferred review under either *Califano* or *Thunder Basin*.

It is presumably because § 252(e)(6) does not provide GTE with an adequate assurance of federal review that the MPSC does not seriously defend on appeal the district court's conclusion that §252(e)(6) satisfies *Thunder Basin* because it defers, but does not preclude, federal review. Rather, the MPSC argues that "there is neither a need nor a requirement for the federal District Court to review [the February 25 order]" because that order is fully reviewable in Michigan state court. Although this argument may be relevant to the question whether the district court should abstain from deciding GTE's claims at this time, *see Romine v. CompuServe Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998), it is wholly irrelevant to the question whether the court has jurisdiction to hear GTE's federal preemption challenges to a state commission order entered in a non-FTA proceeding.

In upholding jurisdiction over GTE's claims under § 1331, we emphasize that it is precisely because state utility commissions play such a critical role in administering the FTA's regulatory framework that they must operate strictly within the confines of the statute. We therefore REVERSE the district court's ruling, uphold its jurisdiction under § 1331, and remand the case for determination on the merits if and when the district court finds GTE's claims ripe for review.[7] In so

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[7] To determine whether a claim is ripe for decision, the reviewing court must consider both the "fitness of the issues for judicial decision and the hardship to the

doing, we hope to further the goals of the FTA by affirming state commissions' statutory role and rejecting an unduly expansive interpretation of § 252(e)(6) that would permit state regulatory authorities to insulate from federal review orders alleged to be contrary to, or preempted by, federal law.

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parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A case is "fit for judicial decision" where the issues raised are purely legal ones and where the agency rule or action giving rise to the controversy is final and not contingent upon future uncertainties or intervening agency action. *Ibid.* The hardship prong concerns the extent of the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law. *See id.* at 153.

In this case, the district court must decide whether the ripeness inquiry demands that one of GTE's competitors actually request access at the tariff rate before deciding the case, or whether the order itself gives rise to a justiciable claim because it imposes an immediate obligation on GTE to sell network elements at predetermined rates.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GTE NORTH INCORPORATED,

Plaintiff,

Case No. 5:98-CV-38

v.

HON. ROBERT HOLMES BELL

JOHN G. STRAND, Chairman;
JOHN C. SHEA, Commissioner, and
DAVID A. SVANDA, Commissioner
(In Their Official Capacities as
Commissioners of the Michigan Public
Service Commission),

Defendants.

Certified as a True Copy
Ronald C. Weston, Sr., Clerk
By:_____
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 7/17/98

OPINION

The subject matter of the present dispute is a February 25, 1998 opinion and order of the Michigan Public Service Commission ("MPSC") which addressed cost studies and rate proposals submitted by GTE to the MPSC on the issue of interconnection by competitors. GTE claims that the decisions by the MPSC were for use in finalized arbitration agreements between GTE and competitors seeking to interconnect with GTE's network. GTE claims that two provisions of the MPSC opinion and order are in conflict with the Federal Telecommunications Act ("FTA"). It claims that the opinion and order are preempted by the 1996 FTA. It also claims pursuant to 28 U.S.C. §1983 that its rights under the FTA have been violated by the MPSC. Before the Court at this time are GTE's motion for summary judgment and the Defendants' motion to dismiss.

I.

The FTA was passed for the purpose of, among other things, fostering competition in local telephone services. The FTA ends the regulated monopolies enjoyed by incumbent local exchange carriers (ILECs) such as GTE. Under the FTA, carriers like GTE are directed to negotiate interconnection agreements with now entrants into the market The House Report accompanying the Act explained that Congress had sought "to shift monopoly markets to competition as soon as possible."

The United States District Court for the Eastern District of Virginia summarized the 1996 FTA.

> The 1996 Act prescribes three interrelated methods a new entrant may use to compete in the local market. First, a new entrant may interconnect its own facilities and equipment with the local exchange carrier's network. See 47 U.S.C. § 251(c)(2). Next, the new entrant may pay the local exchange carrier for unbundled network elements which include the facility or equipment used to provide telecommunications service. See 47 U.S.C. § 251(c)(3); 47 U.S.C. § 153(29). As a third alternative, a new entrant may purchase at wholesale rates from the local carrier "any telecommunications service the local carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4).
>
> To facilitate this process, the 1996 Act provides procedures for negotiation, arbitration and approval of agreements between the local exchange carrier and the new entrant. See, generally, 47 U.S.C. § 252. An agreement, commonly referred to as the interconnection agreement, may be reached through voluntary negotiations, mediation or compulsory

> arbitration. Once the parties reach an interconnection agreement, the state commission shall approve or reject the agreement. See 47 U.S.C. § 252(c). Should the state commission decline to consider the agreement or fail to render a disposition within ninety days after its submission, the Federal Communications Commission ("FCC") may approve or reject the agreement. See 47 U.S.C. § 252(c)(4)-(5). When the state commission has made a determination under § 252, any party aggrieved by that determination may bring an action in Federal district court. 47 U.S.C. § 252(c)(6).

GTE North Inc. v. Morrison, - F. Supp. ___, 1998 WL 260909 at * 1-2 (E.D. Va. 1998).

II.

In the spring of 1996, AT&T and Sprint made requests to GTE for interconnection. When negotiations did not produce an agreements, AT&T and Sprint petitioned the MPSC for arbitration. In March 1997, prior to the finalization of an agreement with AT&T and Sprint, GTE filed a complaint in this Court claiming that a January 15, 1997 order issued by the MPSC violated the FTA. At that time, this Court found that it lacked subject matter jurisdiction to review the order in question because it was not an order approving or rejecting an interconnection agreement submitted by the parties. See e.g. *GTE North v. Strand,* Case No. 5:97-CV-20 (W.D. Mich. June 2, 1997).

In addition to arbitration specific to the AT&T and Sprint matters, the MPSC has opened cases described as generic proceedings to consider interconnection issues related to basic local exchange service competition. As a result of these cases, GTE and Ameritech were required to file comprehensive total service long run incremental cost ("TSLRIC") studies for both regulated and non-regulated services and to file tariffs for

unbundled ports. In response,. GTE filed for rehearing claiming that rates based upon its TSLRICs for unbundled loops would be confiscatory. The MPSC denied GTE's claim. GTE appealed the MPSC order to the Michigan Court of Appeals, and on December 30, 1997, the Michigan Court of Appeals affirmed the order. Following the appeal, the MPSC held proceedings for GTE and Ameritech for the purpose of considering each company's TSLRICs and to determine the prices for unbundled networks and basic local exchange services. Case U-11281 was established to address GTE's cost studies. It is the MPSC's February 25, 1998 opinion in case U-11281 that forms the basis of the matter before this Court. GTE has appealed the February 25 opinion to the Michigan Court of Appeals but claims that the appeal does not include federal issues.

III.

GTE challenges the February 25, 1998 order in two ways. First, it claims that the MPSC violated the FTA with regard to its decision on the combination of unbundled elements. In its opinion, the MPSC found that GTE was required to offer unbundled network elements in combinations or platforms. The opinion stated in part:

> the same principles that mandate the separation of basic local exchange service into its loop and port elements "at a minimum" make appropriate to consider further disaggregation into their smaller, constituent parts. Offering unbundled network elements as combinations or platforms is a matter of defining the level of disaggregation at which unbundling will occur. The Commission reaffirms its prior holding on an incumbent's obligation to provide combinations of element and directs GTE to incorporate that holding in the tariffs that it will submit to implement this order.

GTE claims that the requirement that it provide preassembled combinations or platforms of network elements contradicts limitations Congress placed on an incumbent's duty to provide access to unbundled elements in section 251(c)(3) of the FTA and allows competitors to interconnect at a rate substantially lower than what is allowed under the FTA. GTE relies upon the Eighth Circuit's decision in *Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir.) *cert granted* 118 S.Ct. 879 (1998), in asserting its claim.

The second matter which GTE disputes is the requirement that it file tariffs that set forth rates, terms, and conditions for GTE to provide access to unbundled network elements and interconnection services. GTE claims that this violates the procedures set out in section 252 of the FTA. It claims that the order "impermissibly creates a state-law end-run around the system of private negotiations and individualized arbitration that Congress carefully crafted in the Act."

IV.

As a preliminary matter, this Court must determine whether it has subject matter jurisdiction to hear GTE's latest challenges to a MPSC order. See *FED. R.CIV. P.* 12(h)(3). The MPSC contends that this Court does not have jurisdiction at this time.

Section 252(c)(6) of the FTA provides for federal district court review of an agency determination. It states in part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section [, section 252].

47 U.S.C. § 252(e)(6).

This Court has previously addressed the issue of the extent of its review of a MPSC order. In its June 2, 1997 opinion in the case of *GTE North v. Strand,* (No.5:97-CV-20) this Court discussed the limited federal court review set out in the FTA. This Court quoted the Supreme Court's decision in *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207 (1994) where the Court stated "[i]n cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.' Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." This Court also relied upon the Supreme Court's decision in *Califano v. Sanders,* 430 U.S. 99, 108 (1977), when it stated "where Congress allows for meaningful review, it can be limited as to timing and venue, and courts must respect Congress' choice." *GTE North* at p.5.

The June 2, 1997 opinion went on to explain that the word "determination" as stated in Section 252(e)(6) means final agreement. *Id.* at p.6 (citing *GTE South Inc. v. Morrison,* 957 F. Supp. 800, 804 (ED. Vir. 1997). This Court followed a number of district courts and concluded that it lacked subject matter jurisdiction to hear GTE's claims. *Id.* at p. 7.

This Court has reviewed GTE's challenges to the MPSC's February 25, 1998 opinion and order and finds that it does not have subject matter jurisdiction to review GTE's claims at this time. As stated above, GTE claims that the MPSC order violates section 251(c)(3) of the FTA and the procedures set out in section 252 of the FTA. GTE also claims that the determinations in question will be used in finalizing pending arbitration agreements.

Pursuant to section 252(c)(6) of the FTA, when this Court reviews a final agreement, it will have authority to determine whether the agreement in question complies with sections 251 and 252 of the FTA. However, if this Court were to review the

February 25 order prior to the submission of a final agreement, it "would only delay and complicate the tightly regulated process established in the Act" *Id.* at p. 7 (quoting *GTE Northwest Inc. v Nelson,* No. C96-1991WD (W.D. Wash. March 31,1997)). Also, if this Court were to review every MPSC decision, the MPSC would not have the opportunity during the arbitration process to correct any errors it may have committed. This Court notes that its finding that it lacks subject matter jurisdiction to decide GTE's challenges at this time should not be construed as an approval of the MPSC's decision on the issue of rebundling of elements or on the procedures used by the MPSC during the arbitration process. A determination on those issues will be made if they are incorporated into or give rise to a final agreement and are submitted to this Court pursuant to section 252(c)(6).

GTE has stated that its claims are not based upon section 252(e)(6), rather they are based upon a section 1983 claim and a claim of preemption. This Court finds that this is merely an attempt by GTE to have it review a MPSC opinion prior to the formation of a final agreement. Where Congress has provided an adequate procedure to obtain review of an agency determination, alternative bases for jurisdiction are inapplicable. *Califano v. Sanders,* 430 U.S. at 108; *Louisville and Nashville Railroad Co. v. Donovan,* 713 F.2d 1243, 1245 (6th Cir. 1983) *cert. denied* 466 U.S. 936 (1984); *GTE Northwest v. Nelson, supra* at p.3.

For the reasons stated above, this Court finds that it lacks subject matter jurisdiction to hear GTE's claims at this time.

An order consistent with this opinion shall be entered.

Dated:_____

_____

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GTE NORTH INCORPORATED,

Plaintiff,

Case No. 5:98-CV-38

v.

HON. ROBERT HOLMES BELL

JOHN G. STRAND, Chairman; JOHN C. SHEA, Commissioner; and DAVID A. SVANDA, Commissioner (In Their Official Capacities as Commissioners of the Michigan Public Service Commission),

Defendants.
_____/

ORDER

In accordance with the opinion entered this date;

IT IS HEREBY ORDERED that the Defendants' motion to dismiss for lack of subject matter jurisdiction (docket #8) is **GRANTED** and Plaintiff's complaint is **DISMISSED** without prejudice.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (docket #6) is **DENIED.**

IT IS SO ORDERED.

Dated:_____

_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

CONSTITUTION OF THE UNITED STATES
ARTICLE III--THE JUDICIARY

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

CONSTITUTION OF THE UNITED STATES
AMENDMENT XI--SUITS AGAINST STATES

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1331.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1342.

The district court shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
(2) The order does not interfere with interstate commerce; and,
(3) The order has been made after reasonable notice and hearing; and,
(4) A plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART II--DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network

elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (> 47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART II--DEVELOPMENT OF COMPETITIVE MARKETS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title."